

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERTO P. SOARES,)	Case No. 12-00070
)	
Plaintiff,)	ORDER GRANTING MOTION TO
)	<u>DISMISS</u>
v.)	
)	
RECONTRUST COMPANY, N.A., et al.,)	
)	
Defendants.)	
)	
)	

I. INTRODUCTION

Plaintiff Roberto P. Soares ("Soares") brings this action in connection with the foreclosure of his home in Alamo, California ("the Property"). Soares alleges that the defendants¹ fraudulently qualified him for a loan that he could not afford, refused to offer him a reasonable loan modification, and then wrongfully foreclosed on the Property. With the exception of Mortgage Broker Associates,

¹ The defendants in this action are ReconTrust Company, N.A. ("ReconTrust"); U.S. Bank National Association; HSBC Bank USA National Association as Trustee for JP Morgan Alternative Loan Trust 2007-A2 ("HSBC"); Mortgage Electronic Registration Systems, Inc. ("MERS"); Bank of America, N.A. ("BoFA"), individually and as successor in interest to Countrywide Bank, N.A. ("Countrywide"), Countrywide Home Loans, Inc.; Mortgage Broker Associates; BAC Home Loans Servicing LP ("BAC"), fka Countrywide Home Loans Servicing LP for the Benefit of JP Morgan Alternative Loan Trust 2007-A2; and Does 1 through 100 inclusive.

all of the named defendants (collectively, "Moving Defendants") now move to dismiss Soares's First Amended Complaint in its entirety. ECF Nos. 12 ("FAC"), 19 ("Mot."). The Motion is fully briefed. ECF Nos. 21 ("Opp'n"), 22 ("Reply"). The Court finds this matter appropriate for decision without oral argument. As detailed below, the Motion is GRANTED.

II. BACKGROUND

In December 2006, Soares refinanced the Property with two loans totaling \$1.12 million.² FAC ¶ 7, Exs. A-B.³ Soares applied for the loans on December 20, 2006 at a Countrywide branch located at 2174 N. California Boulevard in Walnut Creek, California. Soares alleges that Countrywide grossly inflated his monthly income on his December 19, 2006 loan application and, thus, qualified Soares for a loan that he could not possibly repay. Id. ¶¶ 8, 10. According to the loan application, Soares's income was \$25,000 per month. Id. Ex. B. Soares alleges that, at the time the application was completed, his monthly income was only \$8,000 to \$10,000. Id. ¶ 8. Soares further alleges that Countrywide charged him excessive and bogus fees without his knowledge or consent. Id.

At some unspecified time, Soares realized that he could no longer afford the mortgage payments on the Property and applied for loan modifications from Countrywide and/or its successor-in-interest, BofA. Id. ¶ 12. Soares alleges that these applications

² A Deed of Trust was recorded on December 27, 2006, naming MERS as the beneficiary and CTC Real Estate Services ("CTC") as the trustee. FAC Ex. D.

³ The Court takes judicial notice of the exhibits attached to Soares's Complaint, as well as the exhibits attached to Moving Defendants' Request for Judicial Notice, ECF No. 19-1 ("RJN").

1 were denied in bad faith and in violation of a stipulated
2 settlement between Countrywide/BofA and California's Attorney
3 General, which provided for remediation of various "predatory"
4 loans sold by Countrywide between 2003 and 2008. Id. ¶¶ 9-12.

5 Soares ultimately defaulted on his loan and a Notice of
6 Default was recorded in November 2010. RJN Ex. 2. The Notice of
7 Default indicates that Soares was over \$41,000 in arrears on his
8 loan payments. Id. On December 9, 2010, a Notice of Substitution
9 of Trustee and Assignment of Deed of Trust was recorded,
10 substituting ReconTrust as the trustee and HSBC as the beneficiary
11 on Soares's Deed of Trust. FAC Ex. F. On March 3, 2011,
12 ReconTrust recorded a Notice of Trustee's Sale. FAC Ex. H. On
13 June 29, 2011, ReconTrust recorded a Trustee's Deed Upon Sale,
14 conveying the Property to BAC. FAC Ex. J.

15 Soares retained possession of the Property after the trustee's
16 sale and BAC brought an unlawful detainer action against him in
17 California Superior Court under Section 1161a of the California
18 Code of Civil Procedure. RJN Ex. 3. On February 6, 2012, the
19 Superior Court entered judgment against Soares and awarded
20 possession to BAC. Id.

21 Soares filed the instant action on January 5, 2012. The FAC,
22 which is the operative pleading in the matter, asserts thirteen
23 causes of action: (1) actual fraud; (2) violation of the Finance
24 Lenders Law, Cal. Fin. Code §§ 4973, et seq., 2200, et seq., 5000
25 et seq.; (3) breach of contract; (4) cancellation of void contract,
26 Cal. Civ. Code §§ 1670.5, 1689, 3412; (5) violation of the Truth in
27 Lending Act ("TILA"), 15 U.S.C. § 1641(g), (6) violation of the
28 California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §

1 17200 et seq.; (7) breach of fiduciary duties; (8) violation of the
2 Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601-
3 2617; (9) declaratory relief; (10) equitable estoppel; (11)
4 violation of the covenant of good faith and fair dealing; (12)
5 wrongful foreclosure; and (13) set aside of trustee sale. Soares
6 prays for damages and declaratory relief, including an order
7 forcing all defendants to rescind any and all trustee's deeds upon
8 sale.

9
10 **III. LEGAL STANDARD**

11 A motion to dismiss under Federal Rule of Civil Procedure
12 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
13 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
14 on the lack of a cognizable legal theory or the absence of
15 sufficient facts alleged under a cognizable legal theory."
16 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
17 1988). "When there are well-pleaded factual allegations, a court
18 should assume their veracity and then determine whether they
19 plausibly give rise to an entitlement to relief." Ashcroft v.
20 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
21 must accept as true all of the allegations contained in a complaint
22 is inapplicable to legal conclusions. Threadbare recitals of the
23 elements of a cause of action, supported by mere conclusory
24 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.
25 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
26 complaint must be both "sufficiently detailed to give fair notice
27 to the opposing party of the nature of the claim so that the party
28 may effectively defend against it" and "sufficiently plausible"

1 such that "it is not unfair to require the opposing party to be
2 subjected to the expense of discovery." Starr v. Baca, 633 F.3d
3 1191, 1204 (9th Cir. 2011).

4
5 **IV. DISCUSSION**

6 **A. Fraud (First Cause of Action)**

7 Soares's fraud claim is predicated on Countrywide's alleged
8 falsification of his loan application. See FAC ¶ 37.
9 Specifically, Soares alleges that Countrywide grossly inflated his
10 income on his December 19, 2006 loan application so that Soares
11 qualified for a loan that he could not possibly repay. Id. Moving
12 Defendants argue that Soares's fraud claim fails to satisfy Federal
13 Rule of Civil Procedure 9(b), which requires plaintiffs to plead
14 fraud with particularity. MTD at 7. Moving Defendants also argue
15 that Soares's claim is time-barred under the three-year statute of
16 limitations for fraud set forth in section 338(d) of the California
17 Code of Civil Procedure. Id.

18 The Court finds that Soares's fraud claim meets the
19 requirements of Rule 9(b). "To satisfy Rule 9(b), a pleading must
20 identify 'the who, what, when, where, and how of the misconduct
21 charged,' as well as 'what is false or misleading about [the
22 purportedly fraudulent] statement, and why it is false.'" Cafasso,
23 U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055
24 (9th Cir. 2011) (internal citations omitted). However,
25 "[i]nstances of corporate fraud may . . . make it difficult to
26 attribute particular fraudulent conduct to each defendant as an
27 individual." Moore v. Kayport Package Express, Inc., 885 F.2d 531,
28 540 (9th Cir. 1989). In such cases, "the allegations should

1 include the misrepresentations themselves with particularity and,
2 where possible, the roles of the individual defendants in the
3 misrepresentations." Id.

4 Here, Soares alleges when -- December 19, 2006 -- and where --
5 2174 N. California Boulevard in Walnut Creek -- he applied for his
6 loan. FAC ¶ 7. He also alleges that his loan application was
7 incorrect because it overstated his monthly income by more than
8 \$15,000 and that this misstatement was made by Countrywide without
9 his knowledge or consent. Id. ¶ 8. It is unclear from Moving
10 Defendants' motion what more Soares is required to plead against a
11 corporate defendant. In any event, the mere fact that Soares no
12 longer knows or remembers the particular Countrywide employee who
13 helped him with his application should not bar his claim.

14 Nevertheless, the Court finds that the fraud claim fails
15 because it is time-barred. Soares waited over five years to file
16 the instant action and the statute of limitations for fraud is only
17 three years. Cal. Code. Civ. Proc. § 338(d).

18 Soares urges the Court to apply the doctrine of equitable
19 tolling on the grounds that a cause of action for fraud "is not
20 deemed to have accrued until the discovery, by the aggrieved party,
21 of the facts constituting the fraud" Id. Specifically,
22 Soares argues that he should not be charged with knowledge of the
23 facts underlying the alleged fraud until recordation of the Notice
24 of Default in December 2010. Opp'n at 6-7.

25 For equitable tolling to apply, a plaintiff "must specifically
26 plead facts to show (1) the time and manner of discovery and (2)
27 the inability to have made earlier discovery despite reasonable
28 diligence. The burden is on the plaintiff to show diligence, and

conclusory allegations will not withstand demurrer." McKelvey v. Boeing N. Am., Inc., 74 Cal. App. 4th 151, 160 (Cal. Ct. App. 1999). Soares has not met this burden. Specifically, Soares has not alleged when or how he discovered that his income was misstated on his loan application. Nor has he alleged why he was unable to discern the alleged fraud from his 2006 loan application or various other 2006 disclosures which revealed the terms of the loan, including the monthly payments.⁴ See FAC Exs. C, E.

For these reasons the Court DISMISSES Soares's first cause of action for actual fraud. The Court GRANTS Soares leave to amend so that he may include additional allegations sufficient to invoke the doctrine of equitable tolling.

B. The Finance Lenders Law (Second Cause of Action)

Soares's second cause of action is premised on the notion that Countrywide violated California's Finance Lenders Law by offering him an unconscionable loan and by failing to disclose critical information prior to the closing of the loans. FAC ¶¶ 39-46. The FAC specifically points to section 22302 of the California Finance Code, which provides that "a loan found to be unconscionable pursuant to Section 1670.5 of the Civil Code shall be deemed to be in violation of this division and subject to the remedies specified in this division." Id. ¶ 41. The Finance Lenders Law also provides that willful violators "shall be liable for a civil

⁴ Soares also contends that he did not discover the fraud earlier because "he [was] confused and uncertain as to who the owner of the Note [was], [and] who [was] able to enforce it." Opp'n at 3. This argument lacks merit. It is completely unclear how Soares's knowledge concerning the ownership of the Note prevented him from discovering that his income was misstated on his application. Further, if Soares was in fact "confused," then he had reason to seek assistance to discern the terms of the loan.

penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the commissioner in any court of competent jurisdiction." Cal. Fin. Code § 22713(c).

Moving Defendants argue that this claim fails because unconscionability cannot constitute an affirmative cause of action. MTD at 7. Moving Defendants rely on Dean Witter Reynolds, Inc., v. Superior Court, 211 Cal. App. 3d 758, 766 (Cal. Ct. App. 1989), which holds that "Civil Code section 1670.5 does not create an affirmative cause of action but merely codifies the defense of unconscionability." Id. Moving Defendants further argue that, under California law, a lender has no duty to determine the suitability of a loan for a borrower. Id. at 8 (citing Phillips v. MERS, 109-CV-01028-OWW-SMS, 2009 WL 3233865 (E.D. Cal. Oct. 2, 2009)). Soares does not offer any meaningful response to these arguments.⁵

Accordingly, the Court finds that Soares's second cause of action fails as a matter of law and DISMISSES it WITH PREJUDICE.

C. Breach of Contract (Third Cause of Action)

In his third cause of action, Soares alleges that Countrywide and BofA breached the loan agreement by securitizing the loan. FAC ¶¶ 47-48. Soares further alleges that the securitization "created confusion and uncertainty as to who the actual owner of the Note is and who if anyone, is able to enforce the Note" Id. ¶ 48.

⁵ In his opposition brief, Soares explains why his loan was unconscionable, but does nothing to rebut Moving Defendants' contention that unconscionability cannot constitute an affirmative cause of action. See Opp'n at 7-8.

1 Moving Defendants argue the FAC is too vague to state a
2 plausible claim since it fails to identify which provisions of what
3 loan agreement were allegedly breached. See MTD at 8. Soares
4 responds that BofA and Countrywide breached paragraph 20 of the
5 Deed of Trust by failing to sell the Note "together with the
6 Security Instrument." Opp'n at 8. Soares's argument does little
7 to clarify matters. Paragraph 20 of the Deed of Trust expressly
8 allows for the sale of the Note. FAC Ex. D § 20. Further, nothing
9 in the Deed of Trust suggests that sale of the Note, independent of
10 the "security instrument," constitutes a material breach. See id.

11 Since the FAC fails to identify how defendants breached the
12 loan agreement, the Court DISMISSES the third cause of action.
13 Amendment would be futile since the contractual provision that
14 Soares intended to cite permits the challenged conduct. As such,
15 dismissal is WITH PREJUDICE.

16 **D. Cancellation of Void Contract (Fourth Cause of Action)**

17 In his fourth cause of action, Soares alleges that the Court
18 may cancel his loan agreements with defendants since the agreements
19 are unconscionable under sections 1670.5, 1689, and 3412 of the
20 California Civil Code. As explained in section IV.B supra, a
21 plaintiff cannot state an affirmative cause of action under section
22 1670.5. Likewise, section 1689, which allows for rescission of
23 "unlawful contracts," cannot support an affirmative cause of
24 action. See Nakash v. Superior Court, 196 Cal. App. 3d 59, 70
25 (Cal. Ct. App. 1987) ("Rescission is not a cause of action; it is a
26 remedy" (emphasis in the original).). Soares's request to cancel
27 the contract under section 3412 also fails, because section 3412 is
28 subject to a four-year statute of limitations. Robertson v.

1 Superior Ct., 90 Cal. App. 4th 1319, 1325-26 (Cal. Ct. App. 2001).
2 Further, for the reasons set forth in Section IV.A. supra, Soares
3 has failed to plead sufficient facts to invoke the doctrine of
4 equitable tolling.

5 Accordingly, the Court DISMISSES Soares's fourth cause of
6 action WITH PREJUDICE to the extent that it is predicated on
7 California Civil Code Sections 1670.5 and 1689. The Court
8 DISMISSES the claim WITH LEAVE TO AMEND to the extent that it is
9 based on Civil Code section 3412. Soares may amend his complaint
10 to allege additional facts sufficient to support equitable tolling.

11 **E. Violation of TILA (Fifth Cause of Action)**

12 Section 131(g) of TILA requires a creditor to notify its
13 borrower of a transfer of the borrower's mortgage loan. 15 U.S.C.
14 § 1641(g). Such notice must occur within thirty days of the
15 transfer and must include information concerning, among other
16 things, the identity and contact information of the new creditor.
17 Id. Soares alleges that HSBC failed to provide him with such
18 notice after it was substituted as beneficiary on the Deed of Trust
19 on December 9, 2010. FAC ¶ 60.

20 Moving Defendants argue that this claim fails because Soares
21 has not shown and cannot show that any damages resulted from the
22 alleged violations. MTD at 10. The Court agrees. Under TILA,
23 "[a] creditor that fails to comply with any requirement imposed
24 under § [131(g)] only faces liability for 'any actual damage
25 sustained by such person as a result of the failure.'" Beall v.
26 Quality Loan Serv. Corp., 10-CV-1900-IEG WVG, 2011 WL 1044148, at
27 *6 (S.D. Cal. Mar. 21, 2011) (quoting 15 U.S.C. § 1640(a)(1)).
28 Here, Soares has not alleged that HSBC's failure to provide notice

1 of assignment resulted in any additional financial charges or any
2 other plausible damages.

3 Soares argues that he has sustained actual damages because
4 "had he been informed in a timely manner of the assignment of the
5 Deed of Trust, he would have had ample time to seek different
6 avenues to protect his real property interest." Opp'n at 10. This
7 argument is unavailing. By the time HSBC's assignment was
8 recorded, Soares had already been notified that he was in default
9 and the Property was subject to foreclosure. Further, the Notice
10 of Default directed Soares to contact HSBC at a particular address
11 and number if he wished to pay off his loan to avoid foreclosure.
12 Compl. Ex. E. The notion that Soares would have done something
13 differently if he had received notice of the assignment is simply
14 not plausible.

15 Accordingly, the Court DISMISSES the fifth cause of action for
16 violation of TILA WITH PREJUDICE.

17 **F. Violation of UCL (Sixth Cause of Action)**

18 Soares alleges that defendants violated the UCL by engaging in
19 a number of unlawful, unfair, and/or fraudulent business practices.
20 Among other things, Soares claims that defendants violated the UCL
21 by: (1) "marketing and funding predatory loans"; (2) "egregiously
22 and in bad faith, failing to and refusing to comply with California
23 law (Civ. Code § 2923.5 et seq.) and public policy"; (3) "failing
24 and refusing to offer a loan modification"; (4) "fraudulently
25 recommending, offering, marketing, accepting, purchasing and or
26 collecting on a debt/mortgage that they . . . should have known was
27 void"; (5) violating Civil Code sections 1667, 1708, 1709, 1710;
28 and 1770; (6) refusing to comply with Moving Defendants'

1 stipulation with the California attorney general; (7) offering a
2 loan agreement in violation of Financial Code sections 4973 and
3 50205; (8) "fraudulently and knowingly procur[ing] or offer[ing]
4 false or fraudulently prepared documents to fabricate the missing
5 gaps in the chain of title . . . in violation of California Penal
6 Code § 155.5"; (9) and "initiating foreclosure proceedings with
7 knowledge of their falsity and with intent to defraud [Soares] in
8 violation of CA Penal Code § 532(f)(a)(4)."⁶ FAC ¶¶ 64-76.

9 Moving Defendants argue that Soares, "as a borrower in default
10 and not a depositor," lacks standing to assert a violation of the
11 UCL. MTD at 11 (citing Intervest Mortg. Inv. Co. v. Skidmore, No.
12 Civ. S-08-1543 LKK/DAD, 2009 WL 2038137 (E.D. Cal. June 2, 2009)).
13 This argument would be persuasive if Soares were only alleging
14 violations of regulations intended to protect depositors. But that
15 is not the case. In fact, Moving Defendants fail to identify a
16 single regulation cited in the FAC that is intended to protect only
17 depositors. As such, they have failed to meet their burden as the
18 moving party.

19 Moving Defendants also argue that Soares's UCL claim fails
20 because he "does not and cannot allege that the alleged predicate
21 criminal violations cause him harm." Id. at 12. Though Moving
22 Defendants do not specify, the Court assumes they are referring to
23 Soares's allegation that they offered fraudulently prepared
24 documents to fabricate missing gaps in the chain of title. See FAC
25 ¶ 75. Moving Defendants reason that Soares would have suffered the

26 ⁶ The Court notes that California "Penal Code § 532(f)(a)(4)" does
27 not exist. Accordingly, the Court dismisses Soares's UCL claim to
28 the extent that is predicated on a violation of this non-existent
provision. The Court also reminds Soares's counsel of their Rule
11 obligations.

1 alleged harm -- the foreclosure of his home -- even if none of the
2 allegedly unlawful acts had occurred. Soares does not meaningfully
3 respond to this argument. Further, it is completely unclear from
4 the pleading what false documents defendants filed or why there
5 were missing gaps in the title. Such threadbare legal conclusions
6 cannot state a plausible claim for relief, let alone meet the
7 heightened pleading standards set forth by Rule 9(b).

8 While Moving Defendants do not address the other alleged UCL
9 violations, the Court finds that they are also far from precise.
10 In many cases, it appears that Soares has not pled any facts which
11 would support the alleged violations. For example, at one point,
12 Soares alleges, with practically no explanation, that his loan
13 violated at least twelve California statutory provisions. See FAC
14 ¶ 73. Further, Soares does not explain what conduct is alleged to
15 be "unlawful," as opposed to "unfair," and/or "fraudulent." In
16 sum, Soares' UCL claim is hardly a "plain statement of the claim
17 showing that the pleader is entitled to relief." See Fed. R. Civ.
18 P. 8(a)(2).

19 Accordingly, Soares's UCL claim is DISMISSED WITH LEAVE TO
20 AMEND. Soares' amended complaint should coherently distinguish
21 each alleged UCL violation as well as set forth what prong of the
22 UCL is applicable to each alleged violation, particular facts
23 supporting each alleged violation, and identifiable legal theories
24 and/or authorities.

25 **G. Breach of Fiduciary Duties (Seventh Cause of Action)**

26 Soares's seventh cause of action for breach of fiduciary
27 duties is asserted only against Mortgage Broker Associates, the one
28 named defendant who has not moved to dismiss. See FAC ¶¶ 78-81.

1 Nevertheless, Moving Defendants move to dismiss this cause of
2 action. They lack standing to do so. Moving Defendants argue that
3 Soares makes "boilerplate agency allegations as to all defendants"
4 in paragraph 7 of the FAC. MTD at 12. Likewise, Soares claims
5 that paragraphs 37 and 104 allege that "Countrywide breached their
6 duty of care when they inflated his income to qualify him for the
7 highly risky adjustable rate loan." Opp'n at 12. The Court
8 declines to read the Complaint so broadly. Soares has asserted
9 thirteen causes of action against seven named defendants. Applying
10 a cause of action to a party who is not expressly identified would
11 deprive the party of the notice to which it is entitled under Rule
12 8. Accordingly, to the extent that Soares's claim for breach of
13 fiduciary duties is directed at any defendant other than Mortgage
14 Broker Associates -- the only party named in that cause of action -
15 - the claim is DISMISSED. If Soares wishes to name other
16 defendants in this cause of action, he may amend his complaint to
17 do so. As to Mortgage Broker Associates, the claim stands.

18 **H. Violation of RESPA (Eighth Cause of Action)**

19 Soares alleges that Countrywide and Mortgage Broker Associates
20 violated RESPA when Countrywide paid Mortgage Broker Associates
21 fees totaling \$8,790 as an incentive to place Soares in a loan he
22 could not afford. FAC ¶¶ 82-84. Moving Defendants argue that this
23 cause of action is barred by the one-year statute of limitations
24 set forth in 12 U.S.C. § 2614. MTD at 13. Soares responds that
25 the statute of limitations does not begin to run until one knows or
26 reasonably should know that a cause of action exists. Opp'n at 13.
27 Several courts have held that the statute of limitations under
28 RESPA is subject to equitable tolling. See, e.g., Hogan v. NW

1 Trust Servs., Inc., 441 F. App'x 490 (9th Cir. 2011); Ortiz v.
 2 Wells Fargo Bank, N.A., C 10-4812 RS, 2011 WL 4952979, at *7 (N.D.
 3 Cal. May 27, 2011). However, in order to invoke equitable tolling,
 4 Soares must plead facts concerning the time and manner of discovery
 5 and his inability to have made the discovery earlier. See Section
 6 IV.A. supra. He has failed to do so. Accordingly, the Court
 7 DISMISSES his RESPA claim WITH LEAVE TO AMEND.

8 **I. Declaratory Relief (Ninth Cause of Action)**

9 Soares's Ninth Cause of Action seeks a declaration that the
 10 subject loan agreements are void and unenforceable. FAC ¶¶ 85-92.
 11 This claim is ultimately a request for relief, and Soares is not
 12 entitled to such relief absent a viable underlying claim. See
 13 Lomboy v. SCME Mortg. Bankers, C-09-1160 SC, 2009 WL 1457738, at *3
 14 (N.D. Cal. May 26, 2009). Accordingly, the Court DISMISSES
 15 Soares's claim for declaratory relief to the extent it seeks a
 16 declaration concerning his dismissed claims.

17 **J. Equitable Estoppel (Tenth Cause of Action)**

18 Soares's tenth cause of action for "equitable estoppel"
 19 asserts that Countrywide and BofA are estopped from enforcing the
 20 loan due to their refusal to offer a reasonable loan modification,
 21 as stipulated in their 2009 agreement with the attorney general,
 22 and because the loan was "void from inception due to fraud." FAC
 23 at 36.⁷ Soares further alleges that Moving Defendants do not have
 24 a right to foreclose on the Property because they failed to perfect
 25 their security interest -- though he does not plead any facts that
 26 would support such a conclusion. See id. ¶ 95.

27 ⁷ There are several errors in the paragraph numbering on page 36 of
 28 the FAC; therefore, the Court refers to the page number rather than
 the paragraph number.

Equitable estoppel "prevents a party from profiting from the detriment he induced another to suffer." Money Store Inv. Corp. v. S. California Bank, 98 Cal. App. 4th 722, 732 (Cal. Ct. App. 2002). The doctrine "acts defensively only" -- it must be pleaded either as a part of a cause of action or as a defense. Behnke v. State Farm Gen. Ins. Co., 196 Cal. App. 4th 1443, 1463 (2011). Accordingly it cannot stand as an independent cause of action. See id.; Money Store, 98 Cal. App. 4th at 732.

Accordingly, the Court DISMISSES Soares's claim for equitable estoppel WITH PREJUDICE.

K. Breach of the Implied Covenant of Good Faith and Fair Dealing (Eleventh Cause of Action)

Soares's eleventh cause of action asserts that Moving Defendants breached the implied covenant of good faith and fair dealing by qualifying him for a loan that he could not afford and then refusing to offer him a reasonable loan modification. FAC ¶¶ 102-08. Breach of the implied covenant involves unfair dealing "prompted by a conscious and deliberate act that unfairly frustrates the agreed common purposes [of the contract] and disappoints the reasonable expectations of the other party." Celador Int'l Ltd. v. Walt Disney Co., 347 F. Supp. 2d 846, 852 (C.D. Cal. 2004) (internal quotations and citations and omitted). "However, the implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." Wolf v. Walt Disney Pictures & Television, 162 Cal. App. 4th 1107, 1120 (Cal. Ct. App. 2008). Because the implied covenant may only be used to further the purpose and terms

1 of an existing contract, it cannot be breached at contract
2 formation. Nor can it be breached when a party refuses to modify
3 the contract's terms. These are precisely the types of breach that
4 Soares is alleging here. Accordingly, the Court DISMISSES Soares's
5 eleventh cause of action WITH PREJUDICE.

6 **L. Wrongful Foreclosure and Set Aside of Trustee Sale**
7 **(Twelfth and Thirteenth Causes of Action)**

8 In Soares's twelfth and thirteenth causes of action, he seeks
9 to set aside the trustee sale of the Property on the grounds that
10 Moving Defendants failed to comply with statutory prerequisites set
11 forth in sections 2323.5 and 2924 of the California Civil Code.
12 FAC ¶¶ 110-117. Specifically, Soares alleges that BofA "fail[ed]
13 to offer in good faith, alternatives to foreclosure and instead,
14 rushed to assert its asserted contractual rights" Id. ¶
15 110. Soares further alleges that ReconTrust violated section 2924
16 by "forclos[ing] on a California property without a valid contract
17 providing it with the power of foreclosure, and did so without
18 complying with other statutory pre-requisites, such as proper
19 notice and good faith efforts to resolve the disputed default."
20 Id. ¶ 113. Soares also claims that Moving Defendants lacked a
21 legal right to foreclose due to the allegedly fraudulent nature of
22 the loan. See id. ¶¶ 110, 114.

23 Section 2924 provides a framework for non-judicial
24 foreclosure: The lender must first record a notice of default; once
25 three months have elapsed, the lender must give notice of the
26 planned foreclosure sale. Cal. Civ. Code § 2924. Section 2923.5
27 concerns the notice of default. It requires the "mortgagee,
28 trustee, beneficiary, or authorized agent" seeking to file a notice

1 of default to first contact the borrower in person or by telephone
2 "in order to assess the borrower's financial situation and explore
3 options for the borrower to avoid foreclosure." Id. §
4 2923.5(a)(2). The notice of default may not be filed until thirty
5 days after this initial contact or after the statute's due
6 diligence requirements are satisfied. Id. § 2923.5(a)(1).
7 Further, the notice of default must include a declaration that the
8 mortgagee, beneficiary, or authorized agent has contacted the
9 borrower. Id. § 2923.5(b). During this initial contact, the party
10 seeking to file a notice of default must advise the borrower that
11 he or she has the right to request a subsequent meeting and, if
12 requested, schedule the meeting within fourteen days. Id. §
13 2923.5(a)(2).

14 Moving Defendants argue that Soares's claims for relief under
15 section 2923.5 are moot because the property has already been sold
16 at a trustee's sale. MTD at 17-18. Soares does not meaningfully
17 respond except to cite an inapposite decision from the
18 Massachusetts Supreme Court concerning a Massachusetts statutory
19 scheme. Opp'n at 16 (citing U.S. Bank Nat. Ass'n v. Ibanez, 458
20 Mass. 637, 941 (2011)).

21 The Court agrees with Moving Defendants. The only remedy
22 available under Section 2923.5 is the postponement of a foreclosure
23 sale until the requirements of the statute have been fulfilled.
24 Mabry v. Super. Ct., 185 Cal. App. 4th 208, 223-24 (Cal. Ct. App.
25 2010). The Court cannot possibly provide such a remedy to Soares
26 since his home has already been sold. See Shaterian v. Wells Fargo
27 Bank, N.A., -- F. Supp. 2d --, 2011 WL 5358751, at *11 (N.D. Cal.
28 Nov. 7, 2011). Accordingly, Soares's twelfth and thirteenth causes

1 of action are moot to the extent they are based on an alleged
2 violation of 2923.5.

3 Moving Defendants also argue that Soares is collaterally
4 estopped from relitigating title and possession of the Property due
5 to the judgment entered against him in the 2012 unlawful detainer
6 action. To a certain extent, the Court agrees. Under California
7 law, a court may apply collateral estoppel to an underlying
8 unlawful detainer judgment brought pursuant to Civil Code section
9 1161a -- such as the unlawful detainer judgment rendered against
10 Soares -- where a plaintiff's claim arises from the alleged
11 invalidity of the foreclosure sale. Malkoskie v. Option One Mortg.
12 Corp., 188 Cal. App. 4th 968, 974 (Cal. Ct. App. 2010).

13 Application of collateral estoppel "bec[olme[s] doubtful only if
14 the claims in the second action involve[] activities or alleged
15 wrongdoing not 'directly connected' with the conduct of the
16 foreclosure sale." Id.

17 Thus, collateral estoppel bars Soares from seeking to set
18 aside the trustee sale based on alleged irregularities in the
19 foreclosure process. Further, as discussed above, Soares's claims
20 arising out of activities that are not directly connected with the
21 conduct of the foreclosure sale are time-barred. Accordingly, the
22 Court DISMISSES his twelfth and thirteenth causes of action WITH
23 LEAVE TO AMEND. Soares may amend his complaint to show why his
24 claims are not time-barred.

25 **M. Tender**

26 Moving Defendants also argue that all of Soares's claims are
27 barred because he has failed to show that he could tender his
28 obligation due under the loans. The Court disagrees. As Moving

1 Defendants point out, a plaintiff must make a full tender before he
2 or she can set aside a foreclosure sale. MTD at 5. Soares does
3 pray for the Court to set aside the foreclosure sale. However, he
4 also seeks a number of other remedies, including damages.
5 Accordingly, Soares's failure to tender is not fatal to all of his
6 claims. It is, however, fatal to his prayer that the Court void or
7 set aside the trustee's sale. If Soares wishes to obtain such
8 relief, then he must plead facts sufficient to show that he could
9 tender the amount due under his loans. See Shaterian, 2011 WL
10 5358751, at *4.

11 Soares argues that several exceptions to the tender rule apply
12 in this case. The Court agrees that at least one exception to the
13 tender rule might apply, but Soares has pled insufficient facts to
14 invoke it. Specifically, the tender rule does not apply where "the
15 borrower's action attacks the validity of the underlying debt."
16 Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 1112-13 (Cal. Ct.
17 App. 2011). Soares has attacked the validity of the underlying
18 debt, alleging that defendants fraudulently induced him to agree to
19 the loan by misstating his income on his loan application. FAC ¶
20 8. However, as set forth above, Soares's fraud claim is time-
21 barred. Thus, as Soares's complaint is currently pled, this
22 exception cannot apply.

23
24 **V. CONCLUSION**

25 For the reasons set forth above, the Court GRANTS Moving
26 Defendants' Motion to Dismiss.

- 27 • Soares's second, third, fifth, tenth, and eleventh causes of
28 action are DISMISSED WITH PREJUDICE.

- 1 • Soares's first, fourth, sixth, eighth, twelfth, and thirteenth
- 2 cause of action are DISMISSED WITH LEAVE TO AMEND.
- 3 • Soares's seventh cause of action for breach of fiduciary
- 4 duties is DISMISSED WITH LEAVE TO AMEND as to all defendants
- 5 except Mortgage Broker Associates.
- 6 • Soares's ninth cause of action for declaratory relief is
- 7 DISMISSED since it is predicated on his dismissed claims.

8 Soares may amend his complaint within thirty (30) days of this
9 Order. Failure to do so will result in dismissal with prejudice of
10 his action against the Moving Defendants. The case management
11 conference set for June 22, 2012 is hereby VACATED and rescheduled
12 to August 10, 2012 at 10:00 a.m. in Courtroom 1, 450 Golden Gate
13 Avenue, San Francisco, California. The parties are to file one
14 Joint Case Management Conference Statement seven days prior to the
15 conference.

16
17 IT IS SO ORDERED.

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19 Dated: May 25, 2012

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21 UNITED STATES DISTRICT JUDGE
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